DOCKET FILE COPY ORIGINAL

BALLER HAMMETT
A PROFESSIONAL CORPORATION

1225 EYE STREET, N. W.
SUITE 1200
WASHINGTON, D. C. 20005

(202) 682-3300
TELECOPIER (202) 682-5822

RECEIVED

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 25, 1993

By Hand Delivery

Md. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments On Program Distribution and Carriage Agreements -- Docket No. 92-265

Dear Ms. Searcy:

Please accept for filing the enclosed original and nine copies of the American Public Power Association's comments in response to the Notice of Proposed Rulemaking on Program Distribution and Carriage Agreements, 58 Fed. Reg. 328 (January 5, 1993).

Also, kindly date stamp and return the additional copy to the messenger.

Sincerely,

James Baller

James Baller

Enclosures

No. of Copies rec'd 0+9
List A B C D E

ORIGINAL

RECEIVED

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage	MM Docket No. 92-265

TO THE COMMISSION:

THE AMERICAN PUBLIC POWER ASSOCIATION'S COMMENTS IN SUPPORT OF NONDISCRIMINATORY ACCESS TO VIDEO PROGRAMMING

Pursuant to Sections 1.414 and 1.419 of the Commission's Rules and the Commission's Notice of Proposed Rule Making ("NPRM"), 58 Fed. Reg. 328 (January 5, 1993), the American Public Power Association ("APPA") respectfully submits these comments to urge the Commission to adopt rules on program access that will foster competition in furtherance of the objectives of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act" or "1992 Cable Act").

I. NATURE OF APPA'S INTERESTS IN THIS MATTER

A. General Description of APPA and Its Members

APPA is the national service organization representing the interests of more than 1750 locally-owned electric utility systems. Most of these public power systems are municipally-owned, but several are organized as public power districts and some are state-owned. APPA also serves the needs of its members that own and operate cable television systems or that are contemplating the creation of locally-owned and -operated cable television systems.

Many of APPA's members use fiber optic or co-axial cable for utility functions including electric load management, supervisory control and data acquisition ("SCADA") systems, and automated meter reading. Some APPA members also use such wiring for intra-governmental communications and educational communications. It is a natural extension for municipalities to utilize these cable networks in combination with cable home wiring to provide local cable television service. Additionally, APPA's member cities are typically "franchising authorities" as that term is used in the 1992 Cable Act.

Approximately two-thirds of the more than sixty existing municipally-owned and -operated cable television systems in the country are located in communities that also own and operate their own electric utility systems. A recent survey by APPA indicates that many other APPA members would consider establishing competing cable television systems if barriers to competition were eliminated. Rules providing for non-discriminatory access to video programming are essential to eliminate one of the main barriers to such competition.

B. Members Of APPA Can Furnish Effective Competition To Existing Cable Operators If Barriers To Entry Are Eliminated

As members of APPA have proven for decades in the electric power industry, municipal competition is particularly valuable, not only within the service area of a particular municipality, but also throughout the country, as a benchmark against which other operators may be measured. Benchmark, or "yardstick," competition should be equally effective in the cable television industry.

Private cable operators essentially serve two masters -- their customers and their shareholders -- whose interests often differ. Customers are interested in fair prices and good service; shareholders are primarily interested in profits that will maximize their return on investment. By contrast, municipal operators have but one master to serve -- the public interest. Municipalities need only to provide the best service possible at rates sufficient to cover the costs of providing and constantly improving the service. They have no need to remove profits from the system.

Competition by municipal operators, and even the threat of such competition, will ordinarily be a more effective regulator of private operators than will regulation itself. Where a municipal operator provides service, direct competition will exist, providing downward pressure on rates and charges and upward pressure on quality and scope of service. In locales that do not enjoy the benefits of direct competition, the threat of competition will provide similar pressures, even if to a somewhat lesser degree.

B. <u>Discriminatory Practices By Cable Television Operators And Satellite Video Programmers Have Impaired the Ability of Members Of APPA To Compete Effectively In The Cable Industry</u>

Several members of APPA, dissatisfied with the prices and the quality of services offered by the cable television operators in their communities, have sought to offer competing cable television service themselves. They have encountered many barriers, some of which are directly relevant to this proceeding. Two examples follow.

The first example involves the Electric Plant Board ("EPB") of the City of Glasgow, Kentucky. For the last several years, the EPB has been offering cable television service to its citizens in direct competition with the existing cable operator, TeleScripps Cable Company. The EPB's efforts to penetrate the market have been significantly impeded by its inability to secure access to TNT and ESPN's National Football League ("NFL") package, both of which are available in Glasgow exclusively to TeleScripps.

To determine the impact of this and other factors affecting its competition with TeleScripps, the EPB commissioned a market survey, a copy of which is appended as Attachment A. The survey indicates that 33.1 percent of all cable subscribers in Glasgow, including 66.7 percent of subscribers of TeleScripps, consider availability of channels to be "most important" in selecting a cable television service. Since the availability of TNT and ESPN's NFL package is the only significant difference between the programming available from TeleScripps and the EPB, it is clear that TeleScripps' exclusive access to TNT and ESPN's NFL package give it a major competitive advantage over the EPB.

Notably, E. W. Scripps, the parent of TeleScripps, owns an interest (though apparently less than five percent) in Turner Broadcasting System (TBS), the principal owner and producer of TNT. Several other cable operators also own ownership interests in TBS.

Another example involves the City of Negaunee, Michigan, which has sought to compete directly with the existing cable television operator, Bresnan Communications. Bresnan operates cable systems in several locations in Michigan and is a partnership of William Bresnan and Tele-Communications, Inc. ("TCI"). When the City of Negaunee sought access to Pro Am Sports System ("PASS"), which furnishes sports programming of great interest to subscribers in Michigan, particularly Detroit Tigers baseball games and University of Michigan football games, PASS at first appeared willing to deal with the City. Before the City could submit a written application, however, a representative of Bresnan, apparently relying upon the leverage that operating in multiple markets gives Bresnan, secured an exclusive contract that had the effect of precluding PASS from selling its programming to the City. These facts were among the matters involved in years of litigation, now settled, between the City and Bresnan. Neither APPA nor the City of Negaunee is aware of whether PASS is owned in part by William Bresnan, TCI or any other cable operator.

As these examples demonstrate, exclusive contracts can have -- and are having -- serious adverse effects on competition in the cable industry. As shown below, the Commission should act forcefully to eliminate or substantially restrict such exclusive and discriminatory arrangements, as Congress intends.

III. APPA'S COMMENTS

The NPRM is an extraordinarily comprehensive and thoughtful document that identifies the key relevant issues and reduces numerous highly complex issues to manageable proportions. In many instances, the NPRM sets forth and calls for comment on several options that would all be acceptable to APPA, provided that the Commission resolves outstanding issues of implementation in a manner consistent with Congress's overriding pro-competitive intent. In the following paragraphs, APPA will focus its discussion upon the relative small number of issues on which it disagrees with the direction in which the NPRM suggests the Commission may be moving.

A. Scope and Coverage of Section 628

In paragraph 7 of the NPRM, the Commission observes that "Congress's concerns were particularly focused on vertical ownership relationships in the cable industry and the extent to which they may restrict the availability and increase the cost of programming." In paragraph 8 of the NPRM, the Commission states that "[w]ith respect to the intended objectives and scope of Section 628, we believe that the proscriptions pertaining to satellite cable programming vendors are apparently focused on practices that are pursued by vertically integrated entities." The Commission calls for comment on this interpretation and upon whether Section 628 "covers conduct beyond actions that are related to discriminatory incentives caused by vertical integration." In this regard, the Commission observes in footnote 18 that "subsection 628(b), which addresses unfair practices, could apply more broadly to all 'cable operators' rather than only to those vertically integrated operators that have an attributable programming interest as specified elsewhere in the Section."

APPA submits that the Commission is correct in reading Section 628(b) as prohibiting <u>all</u> cable operators from engaging in unfair methods of competition or unfair or deceptive acts or practices. The omission of the term "attributable interest" in Section 628(b) when referring to "a cable operator" is not only clear and unambiguous, but it is particularly conspicuous when contrasted with the express inclusion of that term in the same sentence when referring to satellite cable video programmers. In these circumstances -- <u>i</u>.<u>e</u>., where the meaning of a statute is unambiguous on its face -- the Commission can and should apply the statute as written, even if Congress's emphasis on vertical integration in the legislative history could be said to be inconsistent with its treatment of cable operators in Section 628(b).

See Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984); Blum v. Stetson, 465 U.S. 886, 896 (1982).

In any event, there is no necessary inconsistency between Section 628(b)'s coverage of all cable operators and the emphasis in the legislative history on the adverse effects of vertical integration. After all, as the Commission itself found in paragraph 2 of the NPRM, Congress enacted the 1992 Cable Act because it was concerned that the cable industry had become highly concentrated as a result of both vertical and horizontal integration. Furthermore, throughout the hearings preceding the enactment of the 1992 Cable Act, Congress repeatedly heard about abuses of market power by cable operators, particularly in stifling competition by small competitors. Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 102-92, 102 Cong., 1st Sess. 23-27 (1991) ("Senate Report"); see also NPRM at 3 n.8. In these circumstances, it would not be at all surprising for Congress to impose the pro-competitive requirements of the 1992 Cable Act on all cable operators, whether vertically-integrated or not.

That Section 628(b) covers all cable operators can have great practical significance. For example, it was clearly unfair and anti-competitive for Bresnan Communications to induce PASS to grant an exclusive contract that effectively denied the City access to PASS's competitively important sports programming. Yet, that result did not occur because of any "attributable interest" that Bresnan, TCI or some other cable operator may have had in PASS, but apparently because Bresnan had sufficient power to impose its will on PASS as a result of dealing with it in numerous other markets. Clearly, Congress cannot have intended to exempt such conduct from the scope of the 1992 Cable Act, and interpreting Section 628(b) as applying to all cable operators would ensure that the Act would reach practices of that kind.

B. Definition of "Attributable Interest"

In paragraph 9 of the NPRM, the Commission solicits comment on a definition of "attributable interest" for the purpose of determining whether a cable operation is vertically integrated. Specifically, the Commission asks for comment on whether it should adopt the five-percent attribution threshold that it generally uses for the broadcast industry. The Commission also requests comment on whether it should establish behavioral guidelines to determine control irrespective of an attribution threshold.

APPA urges the Commission not to adopt a five-percent attribution threshold. Rather, APPA urges the Commission to deem any attributable above a *de minimis* level to be sufficient for purposes of Section 628. Surely, setting the threshold at five percent would be ineffective to achieve congressional intent. In the context of large, publicly-owned corporations with stock ownership dispersed among numerous small interests, ownership of five percent of the voting stock could represent an enormous investment and perhaps even dominance of the firm. In this context, even a shareholder with a relatively small interest could have a strong influence on the decisions of the firm. Moreover, as both Glasgow's and Negaunee's experiences show, the conduct that Congress intended to prohibit can occur even if the degree of vertical integration is slight or perhaps even non-existent. Accordingly, the attribution threshold should be as small as possible to satisfy the statutory requirement that one exist. APPA also fully supports the Commission's suggestion that behavioral guidelines would be useful and appropriate in addition to any attribution threshold the Commission may adopt.

C. Application of Attribution Standards

The NPRM does not seek comment on precisely when and how an attribution threshold would apply under §§ 628(c)(2)(A)-(D). The APPA believes, however, that it is essential for the Commission to clarify this, to make sure that vertically-integrated cable operators and vertically-integrated satellite programming vendors understand that the Act does not merely apply to prohibit a vertically-integrated vendor from discriminating unlawfully against a purchaser of cable programming with which an affiliated cable operator may be competing but also prohibits any vertically-integrated firm from subjecting any purchaser to unfair, deceptive or discriminatory practices.

A careful review of subsections 628(c)(2)(A)-(D) indicates that the prohibitions spelled out in those sections are not limited to situations involving actual or potential head-to-head competition between a vertically-integrated cable operator and a person seeking access to satellite programming from that operator's affiliated vendor. Subsection 628(c)(2)(A) prohibits a cable operator that has an attributable interest in a satellite programming vendor from unduly or improperly influencing the vendor's decisions as to whether or on what terms to sell programming to "any" unaffiliated multichannel video programming distributor. This language is plainly not limited to sales to distributors in actual or potential competition with the cable operator. Similarly, subsection 628(c)(2)(B) prohibits satellite cable programming vendors in which "a" cable operator has an attributable interest and satellite broadcast programming vendors from engaging in prohibited conduct "among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups . . .." Again, the relevant prohibitions apply regardless of whether a competitive relationship exists between the cable operator owning the attributable interest and the party seeking access to programming. Likewise, subsections 628(c)(2)(C) and (D) prohibit certain practices, understandings, arrangements and activities between a cable operator and a satellite programming vendor in which "a" cable operator has an attributable interest. Once more, Congress's use of the adjective "a" rather than "the" or "such" indicates it did not intend that the prohibitions in question be limited to situations in which actual or potential competition exists between the cable operator with the attributable interest and the putative purchaser of programming.

D. Proof of Injury

In paragraph 10 of the NPRM, the Commission states that "Section 628 is limited to conduct 'the purpose or effect [of which] . . . is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.'" Thus, the Commission tentatively concludes, the "plain language" of Section 628(b) "implicate practices that are both (i) 'unfair,' 'deceptive,' or 'discriminatory,' and "(ii) could significantly hinder multichannel video programming distributors from providing satellite programming to consumers." Having thus found a need for an injured party to establish harm as "a critical threshold requirement," the Commission solicits comments on how a claimant can make the requisite showing.

1. The Act Does Not Require Claimants To Prove Harm

At the outset, APPA submits that the Commission has misinterpreted the "purpose or effect" clause of Section 628(b). That clause should not be read as a limitation on the kinds of unfair, deceptive or discriminatory practices that Congress sought to prohibit, but as a congressional finding that the practices listed in subsections 628(c)(2)(A)-(D) cause competitive harm. Such an interpretation is amply supported by the Act and legislative history, as characterized by Commission itself elsewhere in the NPRM. For example, in paragraph 3 of the NPRM, the Commission finds that

> In drafting the 1992 Cable Act, Congress was concerned that increased

> horizontal concentration and vertical integration in the cable industry have created an imbalance of power, both between cable operators and program vendors and between cable operators and their multichannel competitors (i.e., other cable systems, . . ., etc.) Therefore, Congress has concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors. 8
>
> 8 1992 Cable Act, Section 2(a)(5). See also Senate Report at 24; House Report at 41-45. The legislative history shows testimony of practices that extend exclusive rights for TNT to certain distributors, while larger cable operators have obtained discounts for Turner programming that are unavailable to smaller multichannel video producers. See Senate Report at 26. In Report in MM Docket No. 89-600, 5 F.C.C. Rcd 4962 (1990) (1990 Cable Report), the Commission similarly concluded that the cable television industry has become increasingly concentrated and vertically integrated, thus providing MSOs and vertically integrated cable operators the potential to pursue anticompetitive actions against programming services or competing multichannel providers. The 1990 Cable Report also found anecdotal evidence that some have indeed used this potential anticompetitively. See 1990 Cable Report at 5006, 5008, 5021.

Id. at ¶ 3 (emphasis added). Thus, Congress was well aware of the kinds of practices that it regarded as problematic, and, in enacting Section 628, it required the Commission to issue regulations that, at a minimum, would prohibit such practices in the absence of certain specified countervailing factors.

Congress's treatment of exclusive contracts and other anticompetitive arrangements in subsections 628(c)(2)(C) and (D) further suggests that the Commission has misinterpreted the "purpose or effect" clause of Section 628(b). If the Commission were correct, a claimant asserting that an unlawful exclusive contract existed between a cable operator and a satellite programming vendor would also have the burden of proving that the contract caused significant injury to the claimant or to the public or to both.

Congress, however, did not intend to impose such a burden. To the contrary, in subsection 628(c)(2)(C), Congress required the Commission to issue regulations that would effectively impose a per se prohibition on "practices, understandings, arrangements, and activities, including exclusive contacts" that prevent a multichannel video programming distributor from obtaining programming from a satellite programming vendor in which a cable operator has an attributable interest. In such a case, the claimant need not prove any particular quantum of injury, significant or otherwise, but simply that he cannot secure access to satellite programming because of an exclusive contract or other anticompetitive arrangement between a cable operator and a satellite programming vendor.

Similarly, in subsection 628(c)(2)(D), which applies to areas served by a cable operator on the date of enactment, Congress also did not contemplate imposing upon claimants the burden of proving any particular degree of injury resulting from exclusive contracts. Rather, Congress required the Commission to prohibit all exclusive contracts between a cable operator and a satellite programming vendor in which a cable operator has an attributable interest "unless the Commission determines (in accordance with paragraph (4) [of Section 628(c)] that such contract is in the public interest" (emphasis added). Subsection 628(c)(4), in turn, states that, "in determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following [five] factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator: . . . ." Congress's use of the terms "an" exclusive contact and "such contract" indicates not only that Congress intended to impose the burden of proof upon the party seeking to uphold an exclusive contract, once a claimant has established that such a contract exists, but also that this burden of justification must be met on a case-by-case basis.

Furthermore, requiring proof of injury would also be contrary to the Act's overall objective of fostering competition. A proof-of-injury requirement could mean that a prospective competitor could not enforce its rights until after it had been foreclosed from the market. Recovery of damages might or might not ultimately compensate the would-be competitor for its injury, but it would certainly leave the public without the effective competition that Congress contemplated.

In summary, the Commission's interpretation that the "purpose or effect" clause of Section 628(b) imposes a threshold burden on claimants to prove significant injury is not required by the language or legislative history of the Act, is contrary to the express requirements of subsections 628(c)(2)(A)-(D), and is inconsistent with Congress's intent to promote competition. A more reasonable way to reconcile that clause with the language and purposes of the Act as a whole is to read it as a legislative finding that violations of the kind prohibited in the Act cause significant injury. Moreover, given the structure of the Act, that finding must necessarily apply not merely to the exclusive contracts covered in subsections 628(c)(2)(C) and (D), but also to all unfair, deceptive or discriminatory practices, including those covered in subsections 628(c)(2)(A) and (B) and Section 628(b).

2. At a Minimum, The Commission Should Presume Harm

In the NPRM, the Commission has discussed and sought comment on pages and pages of far-ranging and complex issues that may bear on whether injury has occurred in a particular case. However the Commission resolves these issues, it is clear that requiring claimants to prove significant injury as a threshold matter in each case would be enormously time-consuming, expensive and difficult for claimants, would hurl the Commission and its staff into an administrative quagmire, and would ultimately defeat the congressional goal of encouraging competition. To prevent these results, the Commission should, at the very least, adopt a rebut-table presumption that a claimant has been significantly injured if he establishes that he has been subjected to unfair, deceptive or discriminatory practices of the kind prohibited by Section 628 or by any additional measures that the Commission, in its discretion, may adopt. 1/

The Commission has ample authority to presume injury. NLRB v. Transportation Management Corp. 462 U.S. 393, 402-03 (1983). Moreover, where a presumption is more than "merely an evidential tool" and also functions "to further social, economic, or other policies," the agency is afforded a particularly wide berth, and its determinations must be upheld unless they amount to an abuse of discretion. NLRB v. Tahoe Nugget, Inc., 548 F.2d 293, 303-04 (9th Cir. 1978).

In similar circumstances, other agencies have readily presumed injury. For example, to facilitate awards of refunds of crude oil overcharges, the Department of Energy ("DOE") has fashioned a so-called "presumption of end-user injury." Under that presumption, end-users of petroleum products (other than once-regulated petroleum companies) "need establish only the volume of petroleum products they purchased during the control period to prove that they were injured by crude oil overcharges." 52 Fed. Reg. 13,291, 13,293 (April 22, 1987). The presumption does not relieve claimants of the obligation of making an affirmative showing; under the DOE's procedures, end-users must submit a statement of the volumes of petroleum products purchased during

---

1/ Section 628(c)(2) on its face makes clear that the restrictions that the Commission must adopt by regulation are only minimum prohibitions. The Commission thus has ample authority to prohibit additional practices, such as "tying agreements" and other arrangements prohibited under the antitrust laws.

the relevant period; a statement of non-waiver of claim; a description of the nature of the business in which the claimant was engaged; a description of how the petroleum products in question were used; a statement of the sources of information used in each claim; and, if estimates are employed, an explanation of how the estimates were derived. Id. at 13,295. Once they have made those showings, however, end-users do not "have to submit any further evidence to prove that they absorbed the overcharges." Id. at 13,293. Rather, they "are presumed to have been injured." City of Columbus, Georgia, 16 DOE [CCH Energy Management] ¶ 85,550 (1987).

In adopting its presumption of end-user injury, the DOE took into account numerous factors relevant here. Among these were the congressional purpose in affording prompt relief to claimants, the complexity and difficulty of proving injury, the heavy administrative burdens that the agency would incur in adjudicating injury claims, and the probability that imposing prohibitively expensive burdens of proof would discourage worthy claimants from filing claims. 52 Fed. Reg. at 13,293.

Here, it would be unfair, administratively unworkable and inconsistent with the goals of the Act to require claimants to make detailed showings of significant injury. If a claimant has already have proven that he is the victim of practices that Congress has forbidden, he should not be further victimized by having to make a costly, detailed showing of harm. Rather, it would assuredly be more appropriate -- and arguably essential from the standpoint of deterring anticompetitive conduct -- to impose the burden of disproving injury upon the perpetrators of the unlawful practices.

E. Prior Approval of Exclusive Contracts

In paragraph 33 of the NPRM, the Commission indicates that it has tentatively concluded that it would be impractical to approve exclusive contracts in advance and that it believes the Act's prohibitions on such contacts should be enforced through the complaint process. In the same paragraph, the Commission also requests comment on how it should implement prior-approval or complaint processes with respect to exclusive contracts. In addition, in paragraph 36 of the NPRM, the Commission solicits comment on whether it can establish by rule presumptions that would expedite approval of exclusive contracts in particular circumstances. Specifically, the Commission asks whether it would be appropriate to presume that the public interest is served by exclusive contracts that would facilitate the launch of new service for a specific duration, e.g., two years.

First, APPA vigorously urges the Commission not to allow cable operators and satellite programming vendors to put exclusive contracts into effect without prior Commission approval. Not only would this violate the express requirements of subsections 628(c)(2)(C)-(D) and 628(c)(4), but it would also essentially gut Congress's intent to ban exclusive contracts that are not demonstrably in the public interest. Cable operators and satellite programming vendors would have little incentive to refrain from using exclusive contracts if they were subject only to the chance that affected parties might discover the existence of such contracts and then be willing to expend substantial amounts of time and money to prosecute their elimination through the complaint process. Furthermore, since the timing of access to programming can be critical to the success or failure of a potential competitor, the anticompetitive effects of exclusive contracts might well be realized before the complaint process can run its course. Again, the goal is to foster competition for the benefit of subscribers, not to create potential after-the-fact damage remedies for thwarted would-be competitors. 2/

APPA also submits that the Commission's concern about the administrative burdens of administering a prior-approval process may well prove unfounded. If the Commission makes clear that it shares Congress's aversion to exclusive contracts and will not approve them in the absence of detailed and compelling proof that they are both essential and in the public interest, persons are likely to seek the Commission's approval of such contracts only where a compelling case can be made that they meet the standards specified in subsection 628(c)(4). 3/

2/ Effective prevention of anticompetitive conduct is all the more necessary, as the Act does not appear to provide directly for money damages.

3/ APPA recommends that any procedures concerning prior approval of exclusive contracts include provisions requiring that such contracts be in writing and disclose all material terms and conditions and that sufficient notice and opportunity for participation before the Commission be afforded to all interested parties.

As to the Commission's request for recommendations of practical, expeditious procedures for evaluating requests for prior approval of exclusive contracts, APPA suggests that subsection 628(c)(4) <u>mandates</u> that the Commission evaluate <u>each</u> of the factors listed therein on a case-by-case basis. Thus, while expeditious review may be a desirable goal, if may or may not be possible, depending upon the particular circumstances of each case.

Next, as discussed previously, APPA believes that the Commission has broad authority to fashion appropriate presumptions. Nevertheless, where, as here, the statute spells out the relevant criteria -- specifically, the factors listed in subsection 628(c)(4), which must be applied on a contract-by-contact basis -- the Commission is bound to apply them. Thus, while the Commission might presume that an exclusive contract is beneficial to the extent that it facilitates introduction of new services and is limited in duration to two years, these are only two of the five factors that the Commission must consider under subsection 628(c)(4). The Commission would still have to consider the remaining three factors.

Finally, APPA cannot conceive of any circumstances in which the Commission should approve an exclusive contract for a period longer than two years, regardless of how essential such a contract may appear initially to the success of a new service. If a new service is going to succeed, this should occur well within two years.

F. Discrimination In Program Distribution

In paragraphs 15-25 of the NPRM, the Commission recognizes that Congress did not intend to prohibit all forms of discrimination in price and terms of trade, and it tackles the highly complex issue of how to distinguish discriminations that are lawful and appropriate from those that are anticompetitive and prohibited by the Act. Specifically, in paragraphs 20-23, the Commission identifies and requests comment on four options for drawing such distinctions.

From a substantive standpoint, APPA believes that any of the four options, or some combination, would be workable, so long as the final regulations: (1) fully reflect the pro-competitive purposes of the Act, (2) avoid imposing inappropriate burdens of proving injury on claimants (as discussed in the preceding section), and (3) provide a mechanism to ensure that all concerned have ready access to sufficient information to make effective use of whichever option the Commission selects.

The last point may well be the most important. For in the absence of essential information, neither a purchaser of satellite programming nor the Commission can determine whether unlawful discrimination has occurred in the absence of data necessary to draw appropriate comparisons.

APPA strongly recommends that the Commission require satellite programming vendors to file their rates, terms and conditions with the Commission. To minimize the costs and burdens of filing hard copies of contracts, APPA urges the

Commission to develop a reporting form that would enable it to create a computerized data base containing historical and current data, including information pertinent to the statutory justifications for discrimination, from which purchasers could retrieve data directly through their computers. A purchaser could then compare the prices, terms and conditions for programming offered to him with those in the Commission's data base to determine whether an unjustified discrimination appears to exist. If so, he could then ask the programming vendor for an explanation and supporting documentation. If the purchaser believes that the vendor's justification does not meet the criteria established by the Act and the Commission's implementing rules, he could seek to negotiate a mutually acceptable arrangement with the vendor or file a complaint under § 628(d). If the complaint presents a _prima facie_ case that discrimination exists, supported by the information that the purchaser has obtained from the Commission, from the vendor or from other sources, the burden would then shift to the vendor to demonstrate that the discrimination meets the criteria specified in the Act or in the Commission's rules.

Satellite programming vendors may, of course, object to such a filing requirement. The only alternative, however, would be a requirement that vendors make comparable information available to purchasers directly upon request. Otherwise, in the absence of any other reasonable means of determining whether unlawful discriminations have occurred, purchasers might have no choice but to file complaints with the Commission in order to discover the rates, terms and conditions to which vendors have agreed with others. APPA submits that this would unnecessarily flood the Commission with complaints that could well be avoided or minimized by giving purchasers access to appropriate information.

G. Implementation of Anti-discrimination Rules

In paragraph 27 of the NPRM, the Commission states that it has tentatively concluded that the pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts. The Commission seeks comment on this, including comment on whether it would be appropriate for the Commission to establish prospective deadlines for compliance.

APPA does not agree that the Commission should apply its policies and restrictions under Section 628 only to new contracts. After all, the subject matter of the Commission's new policies and restrictions will be unfair, deceptive and discriminatory practices that, for the most part, may well already be unlawful under anti-trust or other laws; the Commission's new rules will merely facilitate application of the basic principles involved to the cable television industry. In these circumstances, no party can fairly be heard to complain that it had a right to engage in such practices in the past or that it would be unduly injured by being required to desist from engaging in them in the future.